

IN EQUITY

United States
Circuit Court of Appeals
For the Ninth Circuit

NORTHPORT SMELTING & REFINING
COMPANY, a corporation,

Appellant,

vs.

LONE PINE-SURPRISE CONSOLIDATED
MINES COMPANY, a corporation,

Appellee.

BRIEF OF APPELLANT.

On Appeal from the United States District Court for the
Eastern District of Washington, Northern Division.

JOHN P. GRAY,
Coeur d'Alene, Idaho,
JOHN H. WOURMS,
Wallace, Idaho,
Attorneys for Appellant.

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situated in the Republic Mining district in the State of Washington.

The appellee is the owner of the Last Chance mining claim.

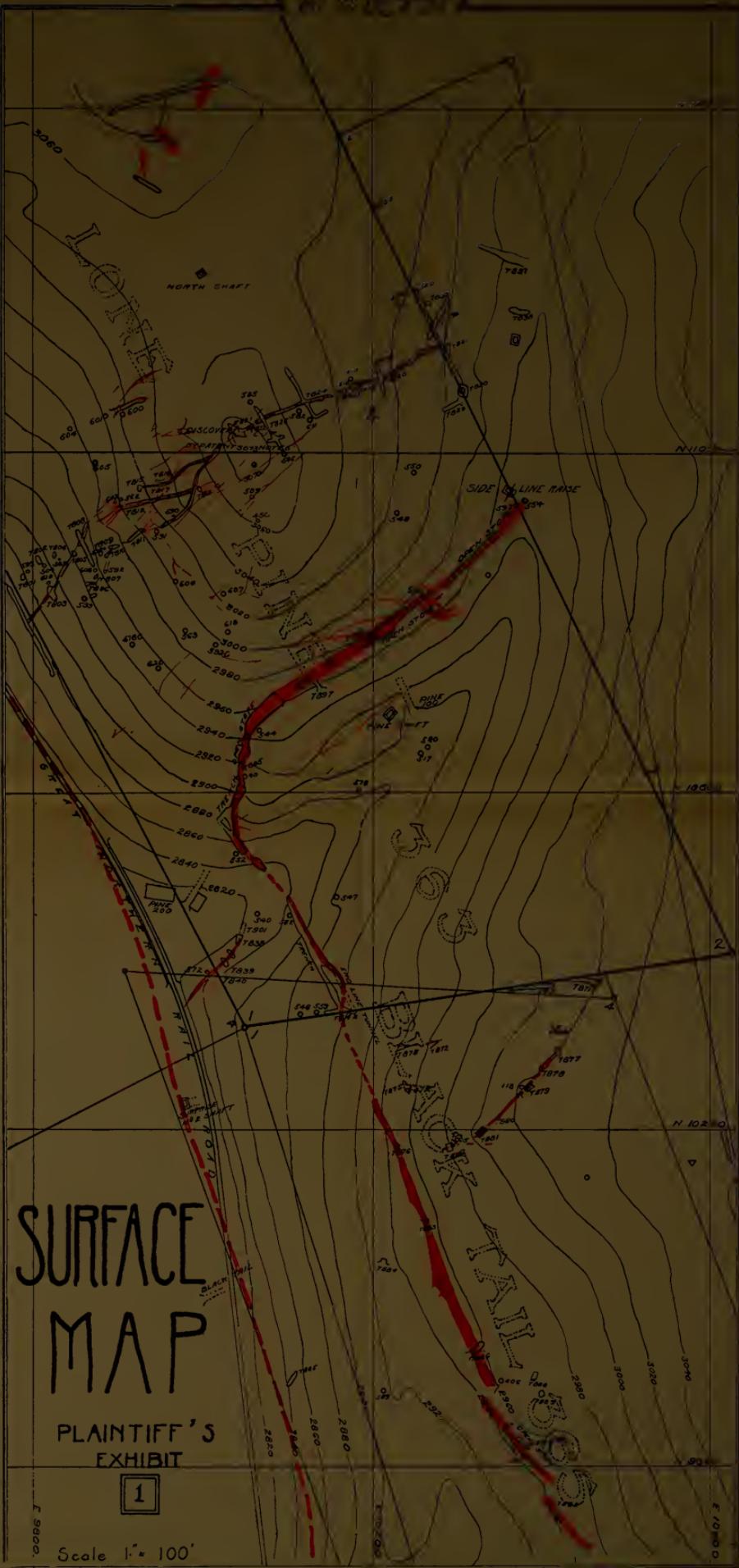
The accompanying diagram shows the relative location of the claims.

The suit is one involving extralateral rights beneath the surface of the Last Chance claim of appellee. It is a suit in equity in the usual form seeking to quiet title, for an accounting for ores heretofore mined by appellee and for an injunction.

The plaintiff (appellant) asserted its right to a segment of the Black Tail vein beneath the surface of the Last Chance claim based upon its ownership of the apex thereof in the Lone Pine claim.

THE COMPLAINT.

In substance, the complaint charges that the plaintiff is the owner of the Lone Pine claim; that the Lone Pine is senior to the Last Chance claim; that within the claim is a vein known as the Black Tail vein, which at its apex enters the south end line and after traversing the Lone Pine claim for a distance, at its apex passes out of the east side line of the Lone Pine at a point approximately 618 feet from its southeast corner; that the vein dips in an easterly direction beneath the surface of the Last Chance claim and that the plaintiff is the owner of that part of the vein upon its downward course beneath the said Last Chance mining claim between planes, one drawn downward through the south end line of the Lone Pine claim extended easterly in its own direction, and the other parallel





thereto at a point drawn downward through the point of departure of said vein through the east side line of the Lone Pine claim.

QUESTIONS NOT CONTROVERTED.

It is not disputed that the Lone Pine claim of appellant is senior in point of time to the Last Chance claim of appellee.

There is no controversy over surface ground.

The title of the respective parties to their mining claims is not questioned.

CONTROVERTED QUESTIONS.

(1) It is claimed on behalf of defendant (appellee) that the Lone Pine location is based upon a discovery of a vein, which crosses the opposite side lines.

The appellant does not dispute that at the point where the notice of location was posted, there is a branching quartz vein which does cross the opposite side lines of the claim. The appellant, however, does maintain that at the time of the location of the Lone Pine claim, the Black Tail vein was known by the locators to exist within the Lone Pine claim, had been discovered by them, contributed to the delineation of the lines of the claim, and was also a discovery or original vein of the Lone Pine claim.

(2) The appellee further maintained that the vein, which crosses the easterly side line of the Lone Pine claim, is not an extension or continuation of the Black Tail vein and does

not cross the south end line of the claim, but on the contrary crosses the west side line.

(3) That conceding that the Black Tail vein crosses both the south end line and the east side line, the plaintiff was, nevertheless, attempting to pursue the vein on its course or strike and not on its dip or downward course.

THE DECISION OF THE COURT.

The court below expressly declined to pass upon the last two questions, but based its decision solely upon the first question. The court held that there could be but one discovery or original vein in a claim and that the vein which exists at the point where the discovery notice was posted by the locators crosses the opposite side line of the claim and that, therefore, even though the other vein was known at the time of the discovery, that it was not a discovery or original vein and the extralateral rights of the Lone Pine claim are controlled by the vein found at the place where the discovery notice was posted.

APPELLANT'S POSITION.

The position of the appellant is that there may be more than one discovery or original vein in a claim; that the point of discovery fixed in the location notice or the point at which the notice is posted is not controlling in determining whether a vein in the claim is an original vein, and that if there is a vein within the claim which was known at the time of discovery and which it was sought to cover by the location, that it is a primary or original vein, and if such vein passes through an

end line, then the end lines of the claim as located are fixed as end lines for all veins.

The trial court, finding that the vein at the point where the discovery notice was posted crossed both side lines and controlled the extralateral rights as to all other veins within the claim, whether known at the time of location or not, dismissed the plaintiff's bill.

ASSIGNMENT OF ERRORS.

Appellant makes the following assignment or specification of errors upon which it will rely upon its appeal from the decree entered herein:

I.

The court erred in not holding that the Black Tail vein within the Lone Pine claim was a primary vein or original vein.

II.

The court erred in finding, holding and deciding that the Black Tail vein within the Lone Pine claim is a secondary or incidental vein.

III.

The court erred in holding and deciding that there could be but one primary, original or principal vein within a mining claim.

IV.

The court erred in not holding that the Black Tail vein, at its top or apex, entered the south end line of the Lone Pine

claim and passed out of the east side line thereof at a point 589 feet from the southeast corner of said claim, and that the vein, being known at the date of location of the Lone Pine claim, the extralateral rights thereon became fixed and the end lines of the claim as located became the end lines for extralateral rights upon all veins.

V.

The court erred in not holding and deciding that the Black Tail vein entered the south end lines of the Lone Pine claim and departed therefrom at a point 589 feet from the southeast corner.

VI.

The court erred in not holding that where a vein, known at the date of discovery and location of a claim, extends through one end line of that claim that the extralateral rights upon that vein and all other veins are controlled by the end lines of the claim as located.

VII.

The court erred in finding, holding and deciding that the defendant was entitled to any part of the Black Tail or No. 2 lode, vein or ledge beneath the surface of the Last Chance claim and between vertical planes, one drawn downward through the south end line of the Lone Pine claim extended in its own direction easterly, and the other parallel thereto and passing through the east side line of said Lone Pine claim at a point 589 feet from the southeast corner thereof, measured along said side line, and in not decreeing said vein within said

planes beneath the said Last Chance claim to belong to this plaintiff.

VIII.

The court erred in making and entering its decree herein in favor of the defendant and in dismissing the bill of complaint of the plaintiff.

IX.

The court erred in not holding, finding and deciding that the ore bodies in controversy beneath the surface of the Last Chance claim were a part of the Black Tail vein, the top or apex of which was within the Lone Pine claim and that the said claim was so located with reference to the said vein that the said ore bodies were a part of the Lone Pine claim and the property of the plaintiff.

ARGUMENT.

THE BLACK TAIL IS A PRIMARY OR ORIGINAL VEIN OF THE LONE PINE CLAIM.

It may be stated that if a discovery or original vein of the Lone Pine claim passes through either of the end lines thereof, that then the end lines of the claim as located become end lines for all veins within the claim.

If the vein at the point where the location notice was posted is the only original or discovery vein of the Lone Pine claim, the side lines of that claim become end lines and the appellant cannot succeed.

On behalf of the appellee, it has been asserted that there

can be but one original or primary vein in a claim; that the vein disclosed at the point where the notice is posted or at the point fixed as the discovery point is the only original or primary vein of the claim, and this, irrespective of what actually is discovered or what is actually known or what actually controlled the locators in laying the lines of the claim upon the ground.

On behalf of the appellant, we assert that there may be more than one primary or original vein; that the point of discovery fixed in the notice or the point at which the notice is posted is not controlling and that if there be a vein in the claim known at the time of the location which the locator sought to include in his location and which aided or controlled in the laying of the lines of the claim upon the ground, that it is an original or discovery vein.

The appellant maintains that the vein (called by appellant's witnesses the Black Tail and by the defendant's witnesses the Lone Pine No. 2 vein) was known at the time of the location of the Lone Pine claim; that its prominent outcrop at Station 545 had been observed by and was known to them at that time; that the locators of the Lone Pine were seeking to locate and did locate an extension of the Black Tail claim and vein; that the outcrop of the Black Tail vein had been observed by them in the Black Tail claim up to within a short distance of the south end of the Lone Pine claim prior to perfecting their location. The knowledge of the location of the Black Tail claim and the outcropping of the Black Tail vein therein and the knowledge of the outcrop at Station 545 was a determining in-

fluence with the locators in placing the lines and corners of their claim and that they were seeking to cover the vein now called by them the Lone Pine No. 2 by their location.

WHAT IS A PRIMARY OR ORIGINAL VEIN.

It may be of advantage first to determine what is an original vein according to the interpretation which has been placed upon the mining statute. The question was squarely presented and squarely decided by Judge Bourquin in

Clark-Montana Realty Co., v. Butte & Superior Copper Co., 233 Fed. 547.

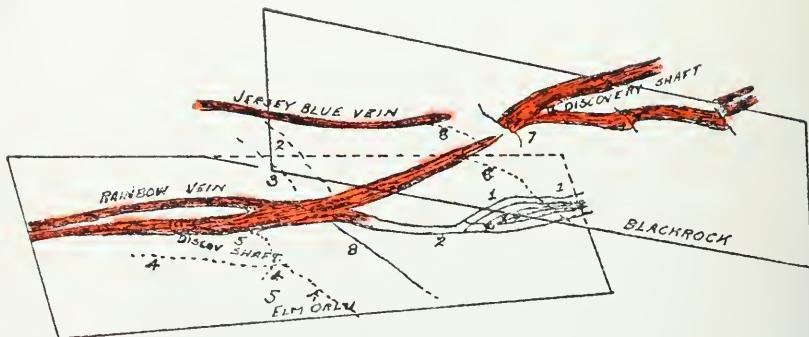
In that case on page 571, Judge Bourquin says:

"No discovery shaft was required when the Blackrock was located. Both the Jersey Blue and the Rainbow were discovered when the location was made, or at least before the patent entry. Evidently the cropping of the two veins gave the appearance of one continuous east-west vein and the location was made accordingly. Neither the Jersey Blue nor the Rainbow is a secondary vein. Both are primary. The Jersey Blue overlaps the Rainbow. Extralateral rights based on it extend east beyond where the like rights based on the Rainbow begin. Indeed, taking the course of the Jersey Blue where fixed by plaintiff south of the Rainbow it is probable it crosses the Black Rock south side line east of the Elm Orlu east end line. That the Rainbow crosses both side lines is not controlling. There can be but one set of end lines, and if the located end lines fix extralateral rights upon one vein,

as they do upon the Jersey Blue, they fix them upon all veins."

We reproduce here the sketch of the claims involved accompanying the opinion as found at page 552 of the 233 Federal.

NORTH



1 Pyle at elevation Blackrock 1100.

2 Creden at Orlu 1100.

3 " " " 1200.

4 Copper " " 800.

5 " " " 1400.

6 Jersey Blue as claimed by plaintiff.

7 Deadwood near surface.

8 Unnamed "Blue" vein

Rainbow and Jersey Blue at Surface

The court found the discovery of the Black Rock claim to have been made upon the Rainbow vein, which it also found

crossed the opposite side lines of the Black Rock. It found the Jersey Blue vein to enter the west end line of the Black Rock, to pass through the Rainbow and to depart through the south side line of the Black Rock at a point not fixed. In any event, it found that the discovery point was upon the Rainbow vein which crossed the opposite side lines and it found that the Jersey Blue vein entered through one of the end lines. The court held both veins to be primary veins and both to have contributed to the marking of the claim upon the ground.

The discovery was found to be upon the Rainbow lode. If the Rainbow constituted the only original or primary vein of the Black Rock claim, then the extralateral rights upon all other veins within the claim would be bounded by vertical planes drawn downward through the side lines and the Rainbow could have no extralateral rights except through the end lines of the Black Rock claim. As there could be but one set of end lines, the Jersey Blue likewise could not have extralateral rights south of the south side line of the Black Rock claim.

Judge Bourquin expressly found that the Jersey Blue vein did not extend to the discovery on the Rainbow and did not extend in that direction, and expressly found that the Rainbow lode did not cross the east end line.

This was one of the controverted questions in the Elm Orlu case concerning which a vast amount of testimony was introduced. It was strenuously urged on behalf of the Clark-Montana Realty Company that the Rainbow vein crossed both side

lines and that therefore no extralateral rights could be had on the Jersey Blue or Creden or Rainbow south of the south line of the Black Rock claim beneath the Elm Orlu claim. Although the court held the vein upon which the location notice had been posted and where the so-called discovery shaft was later sunk crossed both the side lines, it also held that the end lines as fixed on the ground and in the patent were the end lines for all veins including the Rainbow, because the Jersey Blue vein passed through one of the end lines and evidently its outcroppings had influenced the locators in marking the claim.

The judgment in that case gave to the Butte & Superior company, extralateral rights beneath the Elm Orlu,

- (1) Upon the Rainbow east of the apex crossing of the Rainbow through the north side line of the Elm Orlu;
- (2) Upon the Creden vein for that portion thereof which apiced within the Black Rock;
- (3) Upon the Pyle vein for that portion thereof which apiced in the Black Rock;
- (4) Upon the Jersey Blue vein from the westerly end line to the point where it departed from the south side line of the Black Rock.

This decision of Judge Bourquin is squarely in point and squarely in support of appellant's view. There as here, the location notice was posted upon a vein which was afterward found to cross the opposite side lines of the claim. There as here, another vein, which was known at the time of the location of the claim, passed through an end line and out of a

side line just as the Black Tail vein does in this case. There was no continuous outcrop in the Black Rock claim; the Jersey Blue outcropped at various places in the westerly portions of the claim and the Rainbow at various places in the easterly; there was at least 150 or 200 feet of intervening space between the two where there was no outcrop. There as here, no discovery shaft was required.

Judge Bourquin held that the locator evidently saw and discovered both outcrops and believed he was locating a vein running lengthwise of the claim. Subsequently it appeared that the discovery notice was placed upon a vein which crossed the opposite side lines, but the other vein crossing through an end line, the court expressly said, "That the Rainbow crosses both side lines is not controlling," and expressly held that both veins were primary veins.

The trial court in this case recognized that such was the holding in the Elm Orlu case and differs with Judge Bourquin as to the interpretation of the statute. The comment of the trial judge in this case upon that decision is as follows:

"Ordinarily, I would feel constrained to defer to the superior knowledge and experience of the learned judge who wrote that opinion, in matters of this kind, but if the question here involved was at all decisive of the rights of the parties in that case, I confess I cannot understand why it should receive such scant consideration at the hands of the Court in a well considered opinion, or why the question was not even referred to by either of the appellate courts to which the case was carried.

248 Fed. 609

249 U. S. 11, where the title of the case is reversed."

In answer to that language of the court in this case, it may be said first, that while Judge Bourquin is not verbose in a discussion of the question, he is explicit and clear and that very question formed the basis for practically the entire decree.

With reference to the wonder expressed by the trial judge as to why that question was not referred to by either of the appellate courts to which the case was carried, it is but proper to suggest that the trial court undoubtedly forgot that in that respect the decision of Judge Bourquin was against the Clark-Montana Realty Company and in favor of the Butte & Superior company, and the Clark-Montana Realty Company did not appeal from the decree. The Clark-Montana Realty Company, and its counsel accepted that interpretation. The trial court below seemed to place entire reliance upon what he called the discovery vein "which formed the basis of location and patent."

The veins which determine and control the direction of extralateral rights are referred to as original veins, sometimes as primary veins and sometimes as discovery veins. The veins whose extralateral rights they control are referred to as secondary, accidental or incidental. This court refers to them as secondary or accidental veins.

St. Louis M. & M. Co., v. Montana M. Co., 104 Fed. 664.

We assert that the Lone Pine vein if it was known at the time of location and if it was sought to be included within the claim, and if it constituted a function in forming the lines of the claim, was one of the discovery veins of the Lone Pine claim. We are content to rest upon the construction of the

statute in this respect given by Judge Bourquin, a man experienced both in the mining law and in practical mining. His view is supported by reason.

Suppose a great vein to extend through the lines of a claim, to outcrop at irregular intervals through that claim. Suppose there be a little cross vein, the outcrop of which at one point is approximately in line with the outcrop of the great vein extending lengthwise of the claim, and suppose the locator happened to place his discovery notice at this outcrop of the cross vein believing he was locating upon the outcrop of the vein which runs lengthwise of the claim. Is that vein which runs lengthwise and outcrops at intervals through the claim to be held to be a secondary or incidental or accidental vein and the rights of the claim to be solely fixed by the fortuitous discovery later on that the notice happened to be posted upon an outcrop of a small cross vein? We apprehend that the rule as announced by Judge Bourquin is the sensible, the reasonable and the correct rule.

The presumption is that the vein runs lengthwise and not crosswise of the claim as located. In *Enterprise M. Co., v. Rico-Aspen Con. M. Co.*, 167 U. S. 108, on page 115 Justice Brewer says:

"The presumption, of course, would be that the vein ran lengthwise and not crosswise of the claim as located."

In other words, he who seeks to question the correctness of the end lines as fixed by the patent has the burden upon him

to show that the end lines therein described are not the correct end lines of the claim.

We assert that an examination of this record will show that the appellee has not sustained that burden, but that on the contrary the weight of the evidence is with the plaintiff.

THE FACTS AT THE DATE OF PATENT SURVEY AND ENTRY.

For the convenience of the court, we attach a copy of plaintiff's Exhibit No. 1, the surface map of the Lone Pine and Black Tail claims:

It is not disputed that at the date of the patent entry of the Lone Pine the Black Tail vein, as described by plaintiff's witnesses, was known to exist within the Lone Pine claim, and particularly at the outcrop at and near Station 545 or 203-C. (Station 203-C and Station 545 are the same or substantially the same).

The lode line of the claim as surveyed extended through the outcrop near that point and that outcrop constituted a function in forming the lines of the claim as surveyed for patent.

Mr. Ralston, the deputy mineral surveyor who made the patent survey, testified that he was taken upon the ground by one of the locators, Mr. Creasor. We quote the following from his testimony:

"After having gone over the property to ascertain the location of the various original stakes, we then proceeded to go over the general hill, ascertaining first the location of the end-line stakes. It seems that it is a requirement of the Federal law to lay down a theoretical lode line.

SURFACE MAP

PLAINTIFF'S EXHIBIT 1



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Sometimes that lode line is defined by stakes, sometimes by works on the ground, and sometimes by a combination of both. And in order to lay that line intelligently, it was necessary to ascertain all of the physical facts on the ground in connection with the staking. I therefore looked up the discovery as marked on the official plat, the discovery improvement No. 1. We looked up the end line stakes and follow over the ground substantially along the territory which would be defined by the lode line through here (indicating). At the north end, from the north end line stake standing somewhere about where I hold my pointer, in the center of the north end line, and for a distance of perhaps 150 feet south, a rather sharp bit of topography is defined as shown by these contour lines, such as a man on the ground might call a hog back. At the lower or southerly end of the most prominent part of that feature of the topography some quartz and what appeared to be typical croppings of vein matter appeared, and fitted rudely the general direction of a straight line drawn through the center of the claim. Still further croppings were to be found perhaps in the vicinity of the Letter 'N' of the word 'Lone.' Still others again as the discovery cut was approached in the form of apparent croppings under old large trees, some of which stand today and others are down, and so on down to the discovery, continuing along that line on the theory of seeking to ascertain a justification for a lode line in that particular territory, viz., the center of the vein. Croppings were noted at a point westerly or perhaps northwesterly of the southwest end of the open stope.

Q. Just point that out.

A. That would be in the vicinity of No. 545.

Q. Also mark 203-C? A. Yes.

Q. On Exhibit 1. What kind of a cropping was that?

A. That was rather a strong quartz cropping, and

that was the last of any physical evidences of anything which would justify the definition of a lode line. The rest is wash and gulch, but it constituted, in my judgment, sufficient evidence to lay with a good deal of confidence a lode line substantially as it has been laid, defined as being the general direction of the vein.

Q. Was Mr. Creasor at these various places at one time and another with you in your visit?

A. I think so.

Q. This cropping—I want to call your attention to the cropping near the open stope. Was that observable for any distance from there.

A. Yes, quite a distance.

Q. Where can you see it?

A. Well, this is the whole—as these green contour lines show, this is a hill sloping southerly, and is visible from the territory further south in looking north.

Q. That is, from the Black Tail?

A. From the Black Tail, almost from any point on the Black Tail vein. It is particularly visible from the old Black Tail croppings. As for instance, in sighting along over here, from the extension of the Black Tail into the Lone Pine, one may see this whole face of the hill from about this point, namely 578 on up to substantially the top of the hill, or near the discovery cut; and at the present time also you can see these workings.

Q. Can you see those croppings today?

A. These croppings are rather conspicuous and can be seen quite plainly.

Q. Those croppings I understood you to say are quartz?

A. Yes, sir.

Q. Coming back again to the Black Tail, could you observe the croppings at that time of the Black Tail vein going up northerly or northwesterly through that claim?

A. Yes.

Q. Are they observable today, Mr. Ralston?

A. Quite conspicuously.

Q. What do they consist of? What is the character of that cropping there?

A. Well, they are croppings largely of quartz, some vein matter well defined along the side of the hill in the form, in many cases, of the little miniature escarpment there, 3 to 5 or 8 feet high, breaking the average slope of the hill enough to define this plainly.

Q. Then at the time, as I understand it, at the time you made your patent survey, there was known and observed by you and by the others who were there the croppings at 203-C and at the point marked discovery cut and on up at various places towards the north end of the claim? A. Yes.

Q. Therefore, I leave that, Mr. Ralston. What was your opinion at that time as to the course of the vein?

A. That it was a north-south vein or substantially north-south, a continuation in other words of the Black Tail." (R. pp. 171 to 175).

Mr. Creasor, who was a witness for the appellee, did not in any respect controvert this testimony.

Under this uncontested testimony, the vein at Station 545 or 203-C was known at the time of patent entry and it contributed to the direction in which the patent lines were run.

AT THE DATE OF THE LOCATION.

The evidence shows that the Black Tail, or as the appellee

calls it, the No. 2 vein, was known to the locators of the Lone Pine claim at the time of the location of that claim. The evidence shows clearly that the Black Tail claim and the vein therein, at the time of the location of the Lone Pine was known to the locators of the Lone Pine.

The actual location of the Lone Pine claim was made by Creasor and Ryan, both of whom are interested in the appellee company. Robbins, one of the others named in the location notice, is manager of appellee, while the fourth, Clark, is dead. No assistance could be expected by appellant from the original locators.

However, there are certain facts not dependent upon human testimony which impel to the conclusion that the locators of the Lone Pine knew of the vein at the point of the outcrop at Station 545 or 203-C at the time of the location of the claim. They are:

(1) The direction in which the claim is laid. It was certainly the outcroppings of quartz in a northerly and southerly direction which impelled the locators to lay their lines as they did;

(2) It is only reasonable to assume that a prospector when he discovers a vein on vacant land will take as much of that vein as the law permits. If it is worth locating at all, he wants the 1500 feet given by law, and it is contrary to experience to find a locator deliberately locating crosswise of his vein.

(3) The Black Tail claim had already been located at the date of location of the Lone Pine, as had also the Quilp, which

was the extension of the Black Tail on the south. Creasor and Ryan, locators of the Lone Pine, actually located that as an extension of the Black Tail on the north. Creasor testified that he placed the south end stakes of the Lone Pine next to the north end stakes of the Black Tail, except the southwest corner, which he placed over on the Black Tail because he thought the end line was crooked and was going to leave a fraction in there, (R. pp. 425-6). He also testified that on the day he staked the Lone Pine that Welty, locator of the Black Tail, was with him and that he saw and went to the discovery of the croppings of the Black Tail vein in the Black Tail claim, (R. P. 442-3).

Why did he place the corners of the Lone Pine adjacent to the Black Tail end line and corners, if not for the purpose of locating an extension and leaving no fraction in between? The Black Tail vein actually outcrops upon the surface to within a short distance of the north end line of the Black Tail and the south end line of the Lone Pine.

(4) The most prominent outcrop upon the Lone Pine claim is the quartz cropping at station 545 or 203-C. There the quartz stands out of the ground for several feet. Is it reasonable to suppose that these prospectors did not observe, that they were not controlled by, that outcrop in the laying of their lines? Creason and Ryan either placed their south end line next to the Black Tail for the purpose of locating the extension of the Black Tail or for the purpose of including within their lines this particular prominent quartz exposure. The more probable conclusion is that they believed it to be an

exposure of that vein in their claim and were locating the Black Tail extension.

When Mr. Ralston, the deputy mineral surveyor, went over the ground a year later, he reached the conclusion that such was the case that that exposure represented the outcrop of a vein which extended in a northerly direction through the Lone Pine claim.

Mr. Searls testified (R. p. 71) that before trenching was done upon the ground "there might readily have been suggested to the mind of a man who was walking over this area that the Black Tail vein which enters its southerly end line continues northerly through the limits of the claim and crossed its northerly end line."

(5) The first work performed by the locators was at this particular prominent outcrop and no work was done at the point where the discovery notice was posted until a year later.

All of these facts, which do not depend upon human testimony, impel to the conclusion that the cropping of quartz at the point where the notice was posted, the cropping of the vein at station 545 or 203-C and other croppings in the Lone Pine and the croppings within the Black Tail claim, in the language of Judge Bourquin, "gave the appearance of one continuous north-south vein" and the location was made accordingly.

THE FURTHER FACTS:

The relative dates of location of the several claims are as follows:

Black Tail, February 20, 1896

Lone Pine, February 28, 1896

Last Chance, February 29, 1896.

Concerning the locations the following witnesses testified:

John Welty, locator of the Black Tail and E. S. Babb, one of the persons originally interested in the Black Tail, testified for appellant.

Philip Creason, one of the locators of the Lone Pine and Surprise, and Charles Robbins, one of the locators of those two claims, testified for the appellee.

Thomas Ryan, one of the locators of the Last Chance and Lone Pine claims, and still interested in the appellee company, present in court, but not called by appellee, was finally called and examined and his testimony is found at pages 517 to 526 of the record.

Welty testified that Creasor and Ryan camped with him and that he informed them there was some vacant ground on the north end of the Black Tail claim, and pointed it out to them. Creasor admitted that he camped with Welty. He testified that he discovered the quartz at the point where he afterwards posted his notice on the 28th of February and that on the same day Ryan discovered the Last Chance claim. The claims were not staked on that day. That night at camp Creasor wrote the notices of location and on the morning of the 29th returned to the ground and in company with Ryan and Welty posted the notices and staked their claims. The Last Chance notice gives the date of location as the 29th and the Lone Pine

as of the 28th. In any event, according to the testimony of Creasor, the Last Chance was located not later than the morning of the 29th of February.

Mr. Ryan, one of the locators of those two claims, expressly testified that he knew of the vein outcropping at Station 545 on the day he located the Last Chance claim. He describes it as being near the point where later a blacksmith shop was located on the Lone Pine claim (R. pp. 518-523). The position of that blacksmith shop is shown on the patent plat, Exhibit 12 (R. p. 684), and is in the immediate vicinity of Station 545. So that Ryan knew of that outcrop on the 29th day of February, the day the notice was posted and the claim staked. On pages 520 and 521 of the record Mr. Ryan testifies as follows:

“Q. I am not asking you how much you did. Now, when you located the Lone Pine claim you located it northerly and southerly, didn’t you?

A. That is the way I thought it was.

Q. What made you think so, Mr. Ryan?

A. Because that is the way the ledges run.

Q. Did you see an outcropping there?

A. I did, and I located the Last Chance there.

Q. That would be the day after you located the other?

A. I don’t remember.

Q. On the day you located the Last Chance, anyway, you could see the croppings at various places running up and down?

A. I could, sir.

Q. In a northerly and southerly direction?

A. I would not say.

Q. That way you located the claim, anyway?

A. Yes, the way I located the claim, I located it to take that in."

Mr. Welty testified that the first work done upon the Lone Pine claim was by Ryan and Creasor at the outcrop near Station 545. He testified that they were working there within a few days after the claim was located (R. p. 209). Ryan admitted that they had worked there, but he could not say just when (R. p. 520). Mr. Babb testified that he saw Creasor and Ryan working there within two weeks from the date of the location of the Black Tail (R. p. 214). Creasor testified he did not discover that vein at Station 545 until the 6th of March, subsequent to the time he claimed to have recorded his notice of location. Whether he did or whether he did not, is unimportant. Ryan, his co-locator, admitted that he did know of it on the day he made the location of the Last Chance —the 29th of February. It may be suggested that it is unreasonable to believe that Ryan did not inform him of this prominent outcrop and prominent quartz ledge at some time during the day or upon their return to camp that night. The witness Creasor, a little overtrained, undertook to say that he knew nothing about the bold outcrop at Station 545 until after he had recorded his location notice. He does admit that the first work done on the Lone Pine claim was at that point. The patent plat shows a little trench at the socalled discovery, but that trench was not put in until a year after the location

(Test. Robbins, R. P. 409). Creasor undertook to explain that the direction in which the Lone Pine was located was accounted for by the fact that he desired to get as many veins as he could and that by so locating it he would have 600 feet of each. He testified that in his opinion that the vein which he had discovered ran crosswise instead of lengthwise of the claim. His testimony in that respect is found at page 427 of the record, where in answer to a question he testified:

“Q. Did you at that time actually know which way the veins ran?

A. Yes, sir, certainly, they showed as plain as anything could be, every one of them, at the top of the hill.”

And again on cross examination (R. pp. 440-441) he testified as follows:

“Q. Was it your opinion from what you saw at that time (referring to the date of location) that these veins ran in an easterly and westerly direction?

A. Yes.

Q. How did you come to locate this claim in a northerly and southerly direction?

A. So as I would take all the veins in and all the quartz that was in sight and on the top of this ridge.”

His testimony is unbelievable and is clearly false. In the first place, it is contrary to the practice of prospectors to make locations in any such manner, and if they thought the vein were running east and west both that claim and the Last Chance claim would have been swung in the other direction. Ryan undoubtedly told the truth when he said that he thought the vein was running northerly and southerly. But Creasor

is not only disputed by own co-locator, he is disputed by other evidence that is uncontrovertible.

Prior to the time of the trial, the expert engineers for the appellee supervised extensive development for the purpose of undertaking to show that the little quartz vein disclosed at the point where the notice was posted ran crosswise of the claim. From early in February until the latter part of April they struggled in the effort to so trace it and were unsuccessful in tracing it to the side lines. Again, a month or so prior to the trial, renewed efforts were made and they were able with some breaks to following stringers across the side lines.

Mr. Wethered described the difficulties of the expert engineers for appellee in carrying on this development work (R. pp. 237 to 240).

Mr. Robbins, one of the locators, said that they went up to the claim in the September following the location; that he saw the veins were east-west veins, that is, northeast and southwest veins, but that he did not follow any of them nor did he determine where any of them crossed in or out of the claim (R. pp. 410-411).

Also disputing Mr. Creasor's testimony is the fact that in the location notice which he himself prepared of the Lone Pine claim he states that he claimed 1500 linear feet on the Lone Pine running in a northwesterly and southeasterly direction. So also did he claim 1500 linear feet in the same direction on the Last Chance lode.

The location notices of the Pearl and Surprise claims, adjoin-

ing claims, were also shown in the patent record; they were located northerly and southerly, parallel to the Lone Pine.

Attention is called to the fact that in Mr. Ralston's survey in reporting on the veins, he pointed out what was evidently the opinion of the miners and engineers at the time, that the veins dipped to the east. The application for patent sets forth that the presumed general course or direction of the Lone Pine vein, lode or mineral deposit is shown on the official plat and there it is shown running lengthwise of the claim.

The court below in its opinion, in fact says that the No. 2 vein was perhaps known at the time of the discovery and was certainly known very soon thereafter.

From all of the facts, including that finding, it may be taken for granted that that vein was known at the time of the discovery and location of the Lone Pine claim, and that it contributed to the marking thereof. It also contributed to the delineation of the claim in the patent survey.

In the court below, it was strenuously urged by counsel for the appellee that inasmuch as the patent for the Lone Pine claim referred to the discovery trench, that that should be held to be the discovery vein, and yet, it is admitted by both Creasor and Robbins that that trench was not dug for a year after the location. The laws of Washington required no discovery trench or work.

The decision of Judge Bourquin in the Elm Orlu case is based upon a patent for the Black Rock which also refers to the discovery shaft on the Black Rock claim upon a vein which crossed the opposite side lines of the claim. Applying Judge

Bourquin's decision in the Black Rock case to the case at bar, both the small vein at the discovery and the Black Tail vein at Station 545 (203-C) were discovered when the location was made. It is admitted that they were discovered before the location was complete and before patent entry. Under the admissions of Ryan, one of the locators, they were both discovered before the Lone Pine claim was staked.

As in the Black Rock case, evidently the croppings of the two veins gave the appearance of one continuous north-south vein and the location was made accordingly; neither is secondary, both are primary.

For the purpose of showing that the patent to the Black Rock claim contained the same reference to the discovery shaft, we attach a copy of the patent to the Black Rock claim marked Appendix A.

On page 442 of the record, Creasor the locator of the Lone Pine claim, testified as follows:

“Q. It was your purpose, then, to locate several ledges with this claim?

A. Yes, it was, sure.

Q. Did you attempt to trace out any of these ledges at this time?

A. No, not before I located. Just where I could see.

Q. How far could you see this ledge that you say you found at the point where you marked the discovery?

A. Well, that evening I don't think I saw it any more than 20 or 30 feet, or maybe 50 or so.

Q. In which direction, 50 feet?

A. Why, in a northeast by southwesterly direction.

Q. At the discovery?

A. Yes."

And on page 427, he said that he put the location right through in a northerly and southerly direction so that it would catch all the veins on that hill. So Creasor intended to take in the veins which were in that area. An outcrop of one of them, the Black Tail or No. 2, was known to his associate Ryan, and undoubtedly to him.

THE OPINION OF THE COURT.

The trial court, as was its privilege, placed a construction upon the mining statute out of harmony with the construction which was placed upon the same statute in the Elm Orlu case. In the opinion supporting that conclusion, however, are certain statements with respect to facts which we desire particularly to call to the attention of this court. In the course of the opinion the court says:

"Furthermore, there was no known vein extending lengthwise of the Lone Pine claim at the time of location, or even at the time of patent." (R. P. 44).

We may reply by saying that there was no known vein extending crosswise on either of these occasions. The deputy mineral surveyor in his patent notice and also on the stand in this case testified that in his judgment the vein ran lengthwise of the claim. While the locator of the claim, for his own interest, today can say that he thought the vein which he dis-

covered ran crosswise of the claim, his very conduct in locating it as he did disputes any such self-serving testimony.

Then there is the presumption that the vein does extend lengthwise.

It is indeed rare that at either the time of location or the time of patent the locator or owner knows just where the vein does run with reference to the lines of his claim.

To this court, familiar with the practical side of mining, it is of course, unnecessary to say that it is rare indeed that a vein is so exposed at the time of location or for many years thereafter as to permit one to say just what its relation is to the lines of the claim. We need but again to call attention to the Black Rock-Elm Orlu litigation. Those mining claims had actually been worked from 1876 to the date of the trial in 1915 and it was a subject of controversy as to whether or not the Rainbow vein at that time crossed through the east end line or the north side line of the claim. So that it was in no sense essential that a known vein extending lengthwise of the Lone Pine claim should have been known at either time or at all.

The court makes the following further statement:

"There was nothing on the surface to indicate that the Black Tail vein extended that far to the north, and while vein No. 2 was, perhaps, known at the time of discovery and was certainly known very soon thereafter, yet that vein, so far as then known, extended crosswise of the claim, and there was not even a suspicion until years afterwards that it turned abruptly to the south, almost at right angles, and crossed the south end line, if indeed,

that fact can be said to be established at this time." (R. p. 44).

The statement in that excerpt from the opinion that there was nothing on the surface to indicate that the Black Tail vein extended as far north as the point where the notice was posted is disputed by the following facts:

(1) The Black Tail vein was for a long distance substantially a north-south vein. It cropped along the surface of the Black Tail claim. Across the gulch and on the Lone Pine claim there were other quartz croppings at Station 545, others in the vicinity of the point where the location notice was posted and still others at the north end of the claim. That is the indicia which to the prospector indicates the course of his vein. Even at the time of patent, the deputy mineral surveyor regarded it as extending in that direction.

The portion, however, of the statement of the court to which we particularly except and which we particularly criticize is as follows:

"Yet that vein, so far as then known, extended cross-wise of the claim and there was not even a suspicion until years afterwards that it turned abruptly to the south." (R. p. 44).

That statement that so far as then known it extended cross-wise of the claim is not supported by a single scintilla of evidence. The court in writing its opinion must have forgotten the testimony or disregarded the record. That vein did not outcrop for any considerable distance. There was a prominent outcrop at the point referred to at Station 545. If it extended very far from there it went under the wash and it required a

considerable development to show the course of the vein. At the time of patent there was nothing to show that the vein ran crosswise of the claim. Mr. Robbins, who was one of the locators, spent a couple of days on the claim in 1897. He saw the cropping on the Black Tail, or as he called it, the No. 2 vein, near Station 545. He saw quartz exposed north of Station 550; he did not attempt to follow any veins across the claim or to determine where they crossed in or out of the claim; he saw that they were northeast and southwest veins (R. p. 409-11). Creasor, who is still interested in the Last Chance claim, gave no testimony whatever to the effect that he thought that vein crossed the side lines or that he followed it across the claim. Ryan testified that he located the Lone Pine claim northerly and southerly because that was the way the ledges ran and that he located the Last Chance in the direction in which he did to take in the croppings that he saw at various places running up and down the hill. His testimony is as follows:

“Q. I am not asking you how much you did. Now, when you located the Lone Pine claim you located it northerly and southerly, didn’t you?

A. That is the way I thought it was.

Q. What made you think so, Mr. Ryan?

A. Because that is the way the ledges run.

Q. Did you see an outcropping there?

A. I did, and I located the Last Chance there.

Q. That would be the day after you located the other?

A. I don’t remember.

Q. On the day you located the Last Chance, anyway, you could see the croppings at various places running up and down?

A. I could, sir.

Q. In a northerly and southerly direction?

A. I would not say.

Q. The way you located the claim, anyway?

A. Yes, the way I located the claim, I located it to take that in." (R. pp. 520-521).

For the appellant, Mr. Ralston, the deputy mineral surveyor who surveyed the claim, testified that it was his judgment at the time of making the survey that the vein ran lengthwise of the claim. Mr. Babb, one of the locators of the Black Tail, testified that he thought it was the extension of the Black Tail at Station 545.

(3) The court includes the following statement in its opinion:

"The locators of the Last Chance claim knew that the discovery vein on the Lone Pine crossed the side lines and they had a right to assume, therefore, that no extra-lateral rights would ever be asserted in that direction." (R. P. 44-45).

This statement is unsupported by any evidence. It is contrary to the evidence of the very locators of the claim. In the first place, Ryan testified, as we have pointed out before, that he located the Last Chance claim along what he believed to be the Last Chance vein and that he could see croppings at various places running up and down in the direction in which he located the claim (R. p. 521). On page 520, he said he

located the Lone Pine claim and also the Last Chance in a northerly and southerly direction because that is the way the ledges run. Creasor, the other locator, testified that the ledge which he saw at the place where he posted his location notice he did not think he saw on the evening of his location more than 20 or 30 feet or maybe 50 feet in a northeast by southwest direction (R. p. 442).

Mr. Wethered described the difficulty which the expert engineers for the appellee had in developing the small vein shown at the discovery to show that it crossed the side lines of the claim. His testimony is found at pages 237 to 240 of the record. They struggled along from February to the latter part of April at which time they had been unable to trace the vein or any stringer of it across the side lines, and then later, just before the trial, they undertook the work again and did follow some stringers across the side lines. There was no outcrop of it across the claim and no work whatever done to show where it coursed until this law suit was commenced.

The statement in the court's opinion that locators of the Last Chance, therefore, knew that the discovery vein on the Lone Pine claim crossed the side lines is not supported by any testimony. It is contrary to the testimony and is disputed by the conduct of the locators themselves.

One other question involved in the court's opinion requires consideration. The learned judge seems to have misunderstood the position taken by plaintiff that all veins known at the time of the location are discovery or primary veins and

that if any one of them crosses either end line the end lines of the claim are end lines for all veins. The court says:

"All the authorities agree that side lines and end lines do not depend on the mere act of the locator." (R. p. 46).

That is true, so that if the locator's primary or discovery veins or any one of them cross either of his end lines, that is an end line for all such veins.

The court further says:

"Had the discovery vein dipped and extended beyond the north end line of the claim, I fail to see how the right of the owner of the claim to pursue the vein on its downward course or dip beyond the end line could be defeated except by some person showing a prior right." (R. p. 44).

The answer is, as Judge Bourquin said in the Elm Orlu case, if one of the veins known at the time of location actually crosses an end line, then the end lines limit the extralateral rights and no vein can be followed extralaterally through the end line.

Again the court below says:

"If this is true, why should side lines or end lines now depend upon the fortuitous circumstance that it has recently been discovered that vein No. 2 in fact crosses the south end line." (R. p. 44).

If, as a matter of fact, vein No. 2, or the Black Tail vein, is a discovery or primary vein, the fact that it crosses the south end line fixes that as an end line. The question of what is a side line and what is an end line always depends upon what the court describes as "the fortuitous circumstance" of the discovery of the relation of the vein to the lines of the claim.

In most claims it is true there is only one discovery or primary vein. It makes no difference how many years it has been worked or what the owners of the claim or their neighbors believed the vein to be, when it is actually developed across the opposite side lines, they become end lines, and whether it be described as a "fortuitous circumstance" or not is immaterial.

The right extralaterally to a vein depends upon the relation of that vein at its apex to the lines of the claim, and it makes no difference whether that relation was known at the date of location or whether that relation is discovered forty years thereafter. In fact, it was only a short time previous to trial that the branching vein at the place where the notice was posted was found to cross the side lines.

This case but exemplifies the hazard of submitting a mining controversy to a judge unfamiliar with the mining law. From the reading of the court's opinion, one is impressed with the idea that the judge below carried in his mind the fact that it should be an easy matter to know when you locate a claim where the vein runs, what its direction is and what lines it crosses, and that if for a short distance it has a course in one direction that is proof that it continues in such direction indefinitely. All of these assumptions are denied by the experience of every one who knows anything about mines.

II.

THE BLACK TAIL VEIN IS CONTINUOUS FROM ITS CROSSING OF THE SOUTH END LINE OF THE

LONE PINE CLAIM TO THE POINT WHERE IT DEPARTS THROUGH THE EAST SIDE LINE.

The court below did not consider this question and made no finding upon it.

If this court should follow Judge Bourquin's view as expressed in the Elm Orlu case, then it will become necessary to pass upon one other question, namely, the question of whether or not the Black Tail vein bends to the east upon its course and crosses the east side line, as claimed by appellant, or whether the so-called No. 2 vein and the Black Tail vein are separate and distinct veins.

The Black Tail vein is developed for a great distance in the Black Tail claim and to the south thereof in the Quilp. A map, a copy of plaintiff's Exhibit No. 1, which has been incorporated above in this brief, shows the course of the Black Tail vein through the Black Tail claim and into the Lone Pine claim, and thence northerly around a bend in the vein to a point where it departs from the east side line of the claim 589 feet from the southeast corner of the Lone Pine claim.

The witnesses for both parties admitted that the Black Tail vein crossed the south end line of the Lone Pine claim. They did not exactly agree as to the precise point of crossing. (The end line of the claim is in a gulch where the wash is quite deep and where, on account of the sand and wash, it was difficult to perform surface development work).

Mr. Lakes, one of the witnesses for the defendant, admitted that the Black Tail vein extended to the sand winze (R. p.

386) and it was so marked upon the model and upon the map exhibits of the defendant (Def't's Ex. 27-28). All of the witnesses for the defendant admitted that the Black Tail vein at surface extended as far north as Station 558.

The witnesses for the appellant testified expressly that from the point where the Black Tail vein was admitted to be, it and the quartz of it could be followed continuously to the point of crossing out of the east side line of the claim, and that it was a continuous and identical vein.

The views of the two parties may be succinctly stated as follows:

The appellant maintained that the Black Tail vein at the surface extended northerly from the Black Tail claim into the Lone Pine claim and that it there bent and changed its course from a northwesterly course to a northeasterly course. The plaintiff's witnesses, mining engineers and practical miners, testified that the vein and quartz of the vein could be followed continuously from the point where the Black Tail vein was admitted to extend around the bend in the vein and across the east side line.

The appellee, on the other hand, contended that there were two veins, one the so-called No. 2 vein, which it claimed crossed the opposite side lines of the claim, and the other, the Black Tail vein, which it claimed extended in a general northwesterly and southerly direction. There was no development of the so-called No. 2 vein to or across the west side line of the Lone Pine claim. There was no development of the Black Tail vein north of the so-called No. 2 vein. The witnesses

for the defendant, with varying degrees of qualification suggested the hypothesis that there had been originally two veins, but that a large fault movement separated each into two parts; that a relatively small exposure of quartz near the southwest corner of the Lone Pine claim had originally been connected with the so-called No. 2 vein.

The question calls for some analysis of the testimony.

Before referring thereto, let it be again stated that it was admitted by the witnesses for the appellant that the Black Tail vein extended as far north as Station 552 on plaintiff's Exhibit No. 1, which is the same as Station 558 on defendant's Exhibit No. 26. From that point, the witnesses for the plaintiff testified that they followed continuous quartz and vein around the bend and thence through continuous openings and exposures to the east side line of the Lone Pine claim. It was claimed that in the northerly end of the trench at Station 552 was the Lone Pine No. 2 vein, but at least one of the witnesses for the defendant, Mr. Wiley, was forced to admit that there was continuous quartz in the trench extending northerly from Station 552.

Mr. Searls described the tracing of this vein and we may be permitted to quote from his testimony as follows:

“Returning to the Black Tail vein, which is the one with which we are concerned, I would reiterate that that is traceable with absolute continuity, from the Black Tail through the Lone Pine into the Fraction claims, with the exceptions which I will now enumerate. There are a few small transverse postmineral faults which interrupt the continuity of the vein, but all of these are visible

mainly on the surface. Near the stope at a point not far from the discovery of the Black Tail claim, and are shown on this map by two blue lines, one through point 40-C and the other just south of the open stope. These are interruptions to the vein. They displace it at a distance of twenty-five or thirty feet. But they are a very common feature to veins. There is, I believe, no doubt whatever that the segments on the two sides are the same vein, simply separated by this post mineral movement. North of the fault at 40-C the vein is clearly traceable on the surface continuously for a distance of 400 feet, having throughout that a distance width of from four to eight feet of solid quartz and additional stringers. It is a good strong vein cropping continuously through that distance. Just northerly of the point marked T-875, where a small shaft or pit has been sunk a few feet on these croppings, the croppings run under an area of glacial drift. For a distance of perhaps one hundred fifty feet along the strike of the vein, and to the west down toward the corner of Lone Pine claim the ground is cumbered to a thickness of as much as fifteen feet with gravel, boulders and sand which do not permit anything to be seen of the features which are in the bed rock. So that we have in that interval from a point 14 feet northerly from T-875 to the end line of the Lone Pine claim a gap of approximately 90 feet where there is no continuous exposure of that vein, and yet it is exposed again farther on, and the continuity which it exhibits in that direction is such that I believe there can be no reasonable doubt that it is persistent through that gap of ninety feet. At the end line of the Lone Pine a trench has been dug through this glacial drift which covers the surface of the ground, and in the bottom of that trench there was formerly exposed two streaks of quartz belonging to the Black Tail vein, one of which was about ten inches thick and the other somewhat narrower. I might say that these exposures are not so good now, due to the fact that that trench was dug

some time ago and has caved in to some extent, walled up, high walls in the glacial drift. From there for a distance of forty or fifty feet northerly the trench shown on the map does not go down to bed rock. It is right in the wash, although it is 5 or 6 feet deep. But when it does reach the bed rock again near Station T-843 it again exposes the Black Tail vein which is there 4 feet thick of solid banded quartz. From there down to 537 and for a distance of 20 feet—a distance of 15 feet northerly of it, there is a continuous exposure of the Black Tail vein at its apex in the trench. Throughout that distance it is a solid vein varying in width from $2\frac{1}{2}$ to 4 feet. A few feet northerly of Station 537 this trench, coming down the slope, comes to the gulch which is clearly indicated running across the southerly end of the Pine claim by the contours which run around it. Here again we have a short distance where the sand and gravel and boulders carry down in that gulch by the water have obscured the outcrop of the vein, covered it over, so that it is not traceable at the surface, and there is in fact a length there of 42 feet in which no quartz can be seen, because it is covered over with gravel that has been washed out by the stream.

A. (Continuing). From that point the quartz is plainly visible on the northerly side of the ravine, and which there has a strike of north 52 degrees west pointing exactly over to the exposure in the northerly end of a trench facing it south of the gulch and forty-two feet away. The vein can be continuously traced without any break whatever except that there is a bush growing over the outcrop, making it for a distance of about eight feet south of Station 552 invisible. Up the hill across contours 2860, 2900 and 2920 continuously along that trench through the vicinity of Station 554, throughout that distance there is a small vein of quartz continuously exposed in that trench. Near Station 554 the quartz no longer exists. The main part of the vein no longer exists at the

outerop because it has been stoped out-mining operations have taken out the vein through the area marked "Open stope" and have removed the greater portion of the vein which is absolutely continuous from there across to the side line of the Lone Pine claim. In fact the red area between trench 897 and Station 545 and this Station 546 are only pillars left at the surface to help keep the stope from caving in. That distance from near Station 554 to the side line of the Lone Pine claim represents the out-crop of the ore shoot and that ore shoot has been stoped throughout that distance so that where except for the pillars, the vein no longer exists in the ground the existence of the stopes shows that that vein was absolutely continuous throughout that distance." (R. pp. 64-68).

Mr. Jerome J. Day, president of the plaintiff company, a successful and practical miner, a man who has actually developed several large mines, testified that upon acquiring the Lone Pine mining claim, crosscuts were driven by him, one on the 300 foot level from Station 190 to Station 191, and the 400 foot level driven out in a southwesterly direction as a crosscut. In neither of these workings did they find any vein.

It is evident by an examination of the maps that had the Black Tail vein extended northerly or the Lone Pine No. 2 vein, so-called, extended westerly to the west side line of the claim both of these workings would have developed that fact.

In neither crosscut was any vein found and Mr. Day, looking to the practical development of his mining claim, thereupon gave directions to go upon the surface and trace the vein there, first by sinking pits, and then by extending trenches between the pits. These surface workings started near what was then an open stope at Station 544 and the vein was traced

upon the surface around the bend, (R. pp. 152 to 157). He said that this surface work was done for the purpose of assisting him in finding the vein underground by first finding out where the apex was (R. p. 154). On page 155, he explained the reason why the vein was not developed on the surface across the gulch. Mr. Day testified that he had followed the vein continuously upon quartz and vein matter around the bend in the vein to the trench marked upon the map "G-1" (the small trench south of Station 552). He testifies that there is a continuous working and physical connection to the workings in the Last Chance (R. p. 156). Mr. Day testifies that the bending of the banded quartz with the vein is very noticeable around the bend and that where it is last observed at the trench G-1, the vein and the banding of it has a southerly direction. (R. p. 157).

The trenching for the purpose of showing the apex of this vein was not done for litigation purposes, but was done solely for development purposes prior to any controversies (R. p. 158).

Mr. W. L. Herrick, a practical miner, familiar with the Republic camp, testified to the identity and continuity of the vein as claimed by the plaintiff. He particularly called attention to the fact that not only the vein at the surface but the actual ore body as stoped showed the bending of the vein. On page 222, he testified as follows with reference to the vein around the bend:

"Why, the vein has heavy bends. I took a course in that open stope—I managed to get up in a hole in the 200

level—kind of a dangerous looking stope—and the course going easterly was about north 50 degrees east and then as you go near the southwesterly end of the stope it changes to about north 30 degrees east. Then as you get right to the end of the open stope and start to go down the cut, it gets very nearly north—I think about north 10 degrees; then as you go lower from there it is just about due north.”

Mr. Searls explains the manner in which the compression fissures were formed which ultimately became mineralized and his testimony shows that the bending of the vein is exactly what would be expected in a rock fissured as that was and in the manner in which it was. (R. p. 57-59).

The testimony of Mr. Roy Wethered and Mr. J. C. Ralston, mining engineers, is to the same effect.

Mr. William A. Simpkins testified that he had followed the Black Tail vein to the cut or trench just south of Station 552 “where it is continuously observed around a bend, where the bending of the quartz is plainly observable to the open stopes, and thence northeasterly to the side line of the Lone Pine claim.” (R. p. 254). Describing the vein, he says:

“The characteristic feature of this vein is its crooked strike and the number of branches which it has. These run in various directions from the foot and hanging wall, and are usually much larger where they leave the vein than at a little distance. Most of them die out in a short distance or at least disappear under the wash. These branches are both in the foot and the hanging.” (R. p. 254).

On page 256, he describes the branchings from the main

vein. He describes how the vein widens and narrows (R. p. 258). Describing the vein around the bend, he introduced some photographs. His testimony was as follows:

"The vein is continuous. It is banded in most cases, and where banded the bending of the ribbon quartz is plainly observable. The footwall is exposed in some places, and in some places the hanging wall. There are few places where both walls are not exposed, but where they are exposed, there is a very distinct bending of the walls around those turns. I have some photographs of some of those places.

Q. Let us have them marked. We will have them marked Plaintiff's Exhibits 19, 20, 21 and 22. As you speak of the photograph, give its number.

A. Referring to No. 19, I will state that this photograph was taken at Station 552, looking in a northeasterly direction, and shows the footwall of the vein bending around the turn. I might state that this is the sharpest turn noted in that vein.

Q. Will you put some marks showing that bending of the footwall?

A. I will mark 'A' on the left-hand side, 'A' at the center, and 'A' in the lower right-hand corner indicating the footwall of the vein.

At this point the banding is not so evident as in some other parts, but the quartz is plainly depicted and photographed and the footwall. The relative size of the quartz body can be seen in the photograph.

Referring to Photograph No. 20, I will state that this was taken at Station—

Q. You said No. 19 was taken at No. 552.

A. I will have to correct that. It was taken at the

top of the trench where the letter 'T' occurs in the word 'trench' on Plaintiff's Exhibit No. 1.

Q. Just mark 19 there.

A. Looking in a northeasterly direction, and that is the sharpest bend in the vein.

Photograph No. 20 was taken at Station No. 552, looking in a northeasterly direction and shows the vein with the banded quartz. The relative size can be seen by referring to the pick. To illustrate the bending of the vein in the stope which is marked 'open stope' near Station 544 on Plaintiff's Exhibit No. 1, I tried to get a picture looking in a northeasterly direction, but was unable to see a portion of the stope, standing at that point, because there is such a distinct bending that it is impossible to see the easterly end of the stope. So I took the picture from the easterly end, looking down in a southwesterly direction. It is not a very good photograph because the sun was shining and it was taken almost at the sun." (R. pp. 262-263).

Upon the surface, as we have pointed out, Mr. Wiley admitted that through the trench north of Station 552 there was continuous quartz (R. p. 494). The testimony of plaintiff's witnesses is that it was continuous around that bend. One statement from the testimony of Mr. Searls to which we direct attention found at page 81 is as follows:

"The miner certainly considers it as one vein, because the quartz is the thing that he follows. The geologist might have different ideas as to the genesis of it, but I think the continuity of the quartz and the quartz structure is the thing that determines the identity and continuity of the veins, rather than a change in direction."

But a short distance beneath the surface the same proof was

presented. A working called the "Sand Winze" is shown upon various of the exhibits and particularly upon plaintiff's exhibit No. 4. It is admitted by the witnesses for the defendant that the Black Tail vein is disclosed there. Mr. Wiley says it may be the Black Tail and very possibly is. (R. p. 487). Mr. Lakes, one of the geologists for the appellee, says on page 386, with reference to the Sand Winze, that the Black Tail vein is right there; and the exhibits of the defendant have it so marked.

A little distance away a working was driven southerly from Station 331. It is referred to in the testimony as working $331\frac{1}{2}$. Mr. Searls presented a map on a scale of ten feet to the inch, Plaintiff's Exhibit No. 4, which we reproduce here:

This map shows the workings in this vicinity.

As above stated, it was admitted by the witnesses for the appellee that the vein shown in the Sand Winze is the Black Tail vein, but they claim that the vein extending in the working from Station 330 to 331 and thence southerly is not the Black Tail vein, but is the No. 2 Pine vein.

The Sand Winze and the workings southerly from Station 331 are not quite on the same level. In the face of the last mentioned working, the strike and dip of the quartz agrees with the strike and dip of the quartz in the Sand Winze; is not over 15 feet away, and is parallel and similar to it in all respects (Searls, R. pp. 81 to 91). Indeed, Mr. Wiley, one of the defendant's witnesses, was forced to admit that projecting the vein showing in the Sand Winze up to the level of the working south from Station 331, it would actually connect

NORTH

N 10650

A DETAILED SKETCH

PORTION OF

**PINE N^o 2
TUNNEL**

Scale 1 Inch = 30 Feet.

N 10550

PLAINTIFF'S
EXHIBIT

4

SAND WINZE
CAVE OPENING

GUUCH WINZE Ele. 2702.5'

340.6

N 10450

E 10550

E 10650

E 10750

with it and if a raise were put up there, it would actually connect at the end of the drift or near to it (R. p. 487).

Mr. Simpkins says the greatest distance in that area where the vein is not actually opened up continuously is 18 feet and that there is no question about the continuity of the vein from the Sand Winze through there beyond Station 331 (R. p. 260). On page 266, he says the quartz can be continuously followed through that working with the exception of for five or six inches.

With reference to the bending in the vein, Mr. Simpkins (R. p. 267) calls attention to the fact that the bending in the vein is not unlike the bending in various other mines, the names of which he gives.

We have here then the direct, the specific, the certain testimony of witnesses, mining engineers of high reputation and practical miners, that the vein and the quartz of the vein is continuous around the bend from the south end of the trench near Station 552 to which point appellee's witnesses admit the Black Tail vein extends.

Diligent efforts were made by the mining engineers employed by the defendant to develop something across the west side line of the Lone Pine claim which they might connect up with what they called their No. 2 vein. In doing so they developed in a series of trenches a quartz vein, which as it is followed westerly dies out as it reaches a railroad cut just beyond the side line. They were unable to connect it with the vein called by them the No. 2. In order to match this up with the socalled Lone Pine No. 2 vein, it was essential that there

be a displacement on the level of more than 100 feet. It also seemed necessary to any such theory that the other segment of the Black Tail vein to the north should be found.

The witnesses for the defendant testified that in a small working near Station 64-C on their Exhibit 28 was disclosed a quartz vein or veinlet having a general northerly and southerly direction. This quartz showing was never worked upon except to be followed a few feet where it pinches out. Practically no work was done upon that small showing but the engineers for the defendant projected it several hundred feet to where they found a small stringer crossing the Pearl tunnel just west of Station 91-C. No witness for the defendant testified that the exposure near Station 64-C nor the exposure in the Pearl tunnel was the extension of the Black Tail vein. Suggestion was made that those exposures might be. An examination of the testimony will show that it was a mere expression of opinion that the theory was possible.

A brief analysis of the testimony upon this subject will show that the position of the defendant was unsound. In the first place, veins have three dimensions, length as well as thickness, and extension downward. The vein called by the defendant's witnesses the No. 2 vein, drifted on for 1000 feet and developed at the present time to a depth of 600 feet, is represented beyond the ore shoot and the hypothetical fault which they say may have displaced it, by a small quartz showing less than 100 feet in length and ending in the railroad cut. This quartz was disclosed in the railroad cut for many years

without anyone thinking enough of it to even dig a trench upon it until this litigation arose.

The Black Tail vein southerly of the socalled fault, opened for over 1000 feet, with hundreds of feet of workings upon it, they would have the court believe to be represented northerly of their hypothetical fault by the little branch vein in No. 2 tunnel at Station 64-C. Drifted on for 20 feet, that veinlet pinched down to one foot of quartz that the miners considered unworthy of following and a winze 18 feet deep apparently produced the same result.

It is true the defendant contends the same vein is found in the Pearl 300 feet away, but this is pure speculation which cannot stand in the face of the fact that it is not exposed on the bare hillside 40 feet above the No. 2 tunnel. Although defendants admit that it must cross the No. 3 level crosscut, the miners who drove that crosscut did not recognize that they had cut any such vein. They did not shoot a single round on any such vein and in the No. 4 level crosscut, even defendant's witnesses find nothing that they can describe as such a vein. Mr. Day, by whom these workings were driven, testified they developed no vein. So they would represent the Black Tail vein, which is known for over 1000 feet southerly of the alleged fault, by this little branch stringer whose known length is 20 feet, pinching to almost nothing, and the socalled Lone Pine No. 2 vein north of the fault becomes the litigation vein in the trenches near the southwest corner of the claim petering out within a relatively few feet.

This asserted correlation was the only evidence of any such

fault. To support its theory, defendant's witnesses had to assert, in order to match up the claimed segments of the Black Tail vein, the existence of a fault of which the horizontal component is variously estimated to be from 20 to 80 feet and they say this fault moved nearly parallel with its dip so that the actual movement must be very much greater, the vein itself dipping from the horizontal.

They seek to explain the non-appearance of gouge which is supposed to mark this fault in the No. 1 or Pearl tunnel, or across the vein which was developed at the discovery post, by saying the fault has branched.

Assuming such to be true, what has become of the movement? A fault is not to be thought of only as clearly marked by a few inches of gouge. It is a surface along which there has been a differential movement of the earth's crust, one block sliding on the other; in this instance, according to the defendant's witnesses, more than 100 feet vertically. It is admitted that the vein which was developed at the point where the discovery notice was placed was not disturbed by this fault. How could such a movement take place and yet not disturb the ground 200 or 300 feet away? The fault is also not shown in the Pearl tunnel. It was admitted that it does not displace the Surprise vein. Mr. Searls testifies that the 18-foot fault found in the Black Tail stopes in the Black Tail mine extends clear across to the Surprise vein and faults it a similar distance. Mr. Burch, on cross examination, testified that the so-called discovery vein had been faulted two feet by another fault which he projected 100 feet upward and 280 feet hori-

zontally through undeveloped territory, (R. pp. 320-321).

So that in these premises the only fault which seems to suffer an early death from dissipation is the largest one that any one has found in the Republic district.

Observed facts should have greater weight than opinions and theories even of the most experienced and best of mining engineers. Judge Lindley in his treatise on the

Law of Mines, Sec. 615, P. 1473

says:

"Identity may, of course, be proved by continuous development, although this is not always practicable, nor is it necessary. It may be deduced from observed facts in different portions of the mine. At the same time it is to be understood, in the absence of continuous development and exposure, the correlated facts exposed should logically lead to a conclusion of identity. Mere conjecture or intelligent guess would not be sufficient. The incessant features of a given vein as exposed in underground works may ordinarily be presumed to continue throughout undeveloped sections, within reasonable limits, unless there is something in the exposed conditions which negatives such presumption.

The data, however, upon which the presumption is predicated must, of course, be physical facts shown to exist at the different points, which are to be correlated. The existence of such facts must be something more than a matter of mere conjecture. Basic data cannot be inferred."

On page 1475 there is presented an attempted correlation where it was held that the basic data was inference.

In the case at bar the learned gentlemen who appeared for

the defendant inferred their basic data upon which they predicated their opinions with reference to the fault testified to by them. For instance, Mr. Wiley's testimony in that respect is as follows:

"THE COURT: What was the extent of that fault?

A. You mean the amount of the displacement?

THE COURT: Yes, sir.

A. I really don't know. For me it is rather a difficult thing to determine, but to approximate it, *if we assume a movement of about 100 feet, as a thrust fault*, that is, a reverse fault, the hanging wall moving up instead of down, as it sometimes does, it would explain the position of these veins.

THE COURT: What is the extent of it in other directions?

A. The horizontal displacement varies greatly on different levels. The best illustration, perhaps, of that, would be on the map where we have the vein on the surface in Pine No. 2, the extension to the southwest, and making this band along the fault, so that the horizontal displacement, if you measured at right angles to the vein, over to a point opposite *where this extension would be, if extended*, would measure 50 or 60 feet, but if you take the distance between the last occurrence of quartz, *it might be nothing and would be very much less than that.*" (R. p. 482-3).

Can it be that on such speculative conjecture there can be a finding that there was any such fault as assumed by defendant's witnesses in the face of the direct, the positive and the certain testimony of continuous vein and continuous quartz around the bend.

Mr. Wiley distinctly does not testify that the disclosure at

64-C is the faulted segment of the Black Tail vein (R. p. 485). That Mr. Wiley did not care to squarely place himself on record as in favor of any such theory can be easily determined by examining his testimony (R. pp. 487-489). He admitted on page 500 that this fault which he had been talking of did not displace or fault the socalled Discovery vein. He says that it has terminated before reaching that vein. In other words, Mr. Wiley assumes that the small showing of vein at Station 64-C is a faulted segment of the Black Tail, and then assuming a fault with a movement of 100 feet as a thrust fault he says it would explain the position of the veins.

Mr. Burchi approaches the subject from another angle. He assumes a fault with a 120 foot vertical throw and therefore concludes that the exposure at 64-C is a part of the Black Tail vein. His testimony in that respect will be found at pages 321-322. He says that his theory is the only one which seems to fit, (R. p. 322).

It is absolutely impossible from the reading of that testimony to ascertain how he could figure any such fault except by first assuming that the small exposure at 64-C was a severed portion of the Black Tail vein.

Mr. Lakes' testimony with reference to his method of figuring out the fault is found at pages 373-375, where he says he secured his figures by taking the strike of the vein as shown in the southwestern part of the No. 2 level and what he called the "continuation" at 64-C and in that way measured the displacement.

If the court will undertake to follow Mr. Lakes' testi-

mony with reference to this mythical fault (R. pp. 382 to 387), it will be seen that the mining engineer himself is simply guessing.

So that the court cannot find that there is any such fault unless it is first found that the vein exposed in the working 64-C is a severed or faulted portion of the Black Tail vein. The entire fault theory is based upon the inferring of this basic data.

It is incumbent upon the defendant in presenting its theory not to rest alone on the claim that there was a fault, but to show that what they call the Lone Pine No. 2 vein and the Black Tail vein mutually intersect and cross each other. There is no testimony except the inference and guess of the mining engineers to the effect that they do. Not a single witness testified to a single exposure where he saw the veins crossing. The whole theory of crossing depends on a magnification of the little stringer in the drift and winze at Station 64-C to the importance of a segment of the Black Tail vein; on the magnification of the vein in defendant's cuts near the southwest corner, dying out in the railroad cut to the importance of a segment of the so-called No. 2 vein and then to assume a 100 foot fault which does not cut anything else, to bring these exposures opposite each other.

How much more reasonable it is to suppose that the unimportant stringer of quartz followed for a short distance in the drift and winze at 64-C is one of the branches of the vein, a number of which were described by Mr. Simpkins in his testimony, and testified to by Mr. Searls (R. p. 511), and that the

exposure near the southwest corner is simply a filling with quartz of one of the small northeast conjugate fissures, as Mr. Searls says many of them were, by the same great stress which formed the main vein.

It is true according to the witnesses for the defendant that these northeast-southwest fissures were very numerous. How therefore can it be correlated to the one and not to another of the many such? It is pure assumption. It is perfectly evident that this little vein in the southwest corner of the Lone Pine does not extend to the Surprise. Why, therefore, are we called upon to presume or infer that it will extend to the Black Tail, or as our friends on the other side called it, the Lone Pine No. 2?

Defendant seeks to explain the turn in the croppings of the Black Tail vein by attributing it to migration on the hill side. This elementary consideration is apparent to the court and the witnesses for the plaintiff conceded that some of the apparent bending was attributable to migration, but the cropping of a crooked vein migrates as well as that of a straight one, and in this instance it is admitted that there is a bending in the vein itself. Both on the surface and on the 200 level, the vein turns nearly half way around, that is to say, from an east-west strike to a north-south strike within the area where it is conceded by the defendant to still represent the Lone Pine No. 2 vein in place. Is it not just as likely that this bend which has been initiated will continue and that the vein will turn around to the southeast strike as easily as to turn back

again to the southwest strike which it has, going toward the east side line?

True defendant asserts that the bend in this vein is caused by drag on their hypothetical fault, and yet their own maps and testimony show that the fault makes the same turn as the vein bending more than 30° in strike. As Mr. Searls testified, it is evidence of the fact that the course of the vein controlled the course of the movement along this post mineral fault rather than that the fault dragged the vein.

A convincing argument against the theory of the defendant with reference to this alleged fault with the great movement attributed to it, is the condition shown in the No. 2 tunnel level where the quartz on two sides of the fault as it is pictured on defendant's exhibits is solid and in place. No witness denied such fact. It is inconceivable that a great earth movement such as that described by the witnesses for the defendant could have taken place along the plane of that fault through that solid quartz and have left it undisturbed and unbroken. While migration might give an apparent bend to the vein on the surface because of the contour of the ground, it cannot affect the trace of the vein on the level, and on the 200 foot level this vein, as admitted, shows a bending as claimed by the plaintiff.

On the No. 2 level, of which either the roof or the floor constitutes a level plane, the solid, unbroken quartz vein is testified to by Mr. Searls as exhibited upon plaintiff's 10 foot detailed map, Exhibit 4, copy of which has been inserted in this brief, to turn around gradually from a course of North

30° East through North and South to a course of South 28° East in the face of the working southerly of Station 331.

While there is some conflict in the testimony as to the exposure at this point, it is perfectly evident that the quartz in the end of the working is not parallel with the working, but cuts diagonally through it and has turned around to a course exactly parallel to the Black Tail vein farther south and to a course which by a projection not to exceed 15 feet will connect it up with the exposure in the Sand winze and in the workings at the collar of the main winze, concededly the Black Tail vein.

So that on this 200 level, with the question of migration eliminated, we have the turn of the vein, continuously developed, and an examination of the record shows that all of the witnesses for the defendant testified that the quartz in the face of that working south of Station 331 was the quartz of what they called the Lone Pine No. 2 vein. Mr. Wiley admits that the quartz of the Black Tail vein as shown in the Sand winze would upon its upward course connect with that showing on the No. 2 level. It is only 15 feet away.

The continuity of the vein is not determined by the continuity of the ore shoot or of commercial ore. The main ore shoot ends, in a general way, near the vicinity of the bend in the vein. In the upper levels and at the surface it enters the bend, that is to say, the open stopes participate in the bend. As Mr. Herrick testified he took courses in the open stopes showing the turning and bending of the vein itself from a course of North 50° East around to a course of nearly north

and south (R. p. 222). In the lower levels, the stopes do not extend up to the bend.

Some of the witnesses for the defendant sought to take advantage of the change in the character of the vein beyond the ore shoot to further their contention that it was faulted. They undertook to contrast the size of the vein where stoped with what is admitted to be the Black Tail vein at Station 558; to point out that on the lower levels the drifts were not continuous around the bend. The court will understand and appreciate the fallacy of their position. If the ore shoot extended in undiminished size and tenor around to the end line, there would be no controversy over the question. The miners would have followed the vein around in the drifts and stopes, but the ore shoots end where the stopes end. This is just as true under the contention of the defendant as under the view of the plaintiff.

There is no evidence to show that the vein ends where the stope ends; both parties claim it continues beyond. It either continues around the bend and across the end line where it again swells out to make a second ore shoot in the Black Tail claim some distance away, as asserted by plaintiff's witnesses, or it stops part way around the bend diminished in size and is there faulted 100 feet or so. Under either contention, the vein is admittedly smaller and weaker in the southern portion of the Lone Pine claim, and the contrast in width, the narrowing or pinching of the ore shoot is operative under either theory and is no argument against it.

But this change in the width of a vein is not unusual. Mr.

Wiley (R. p. 496) admitted that a vein as wide as fifty-five feet might pinch down to an inch, and when his attention was called to the Argonaut-Kennedy vein, he remembered being a witness in litigation involving that vein and having traced it from a width of fifty-five feet down to less than an inch.

Judge Bourquin in

Clark-Montana Realty Co. v. Butte & Superior Copper Co., *supra*, p. 560

in describing the Rainbow, one of the great lodes of Butte, says:

"At places in these premises it is 200 or more feet in width and largely commercial ore, while at others it narrows to a few feet, if not to a mere fissure, so far as ore is concerned."

With reference to the gouge which is found along the drift near Station 331, Mr. Searls in rebuttal testified that that gouge itself bends around and follows the bend in the vein, and shows that the turn in the vein is not referable to the drag in the fault because the fault itself turns. In other words, the fault is simply a postmineral fault following along the vein (R. p. 505). Mr. Searls testified that he has examined the No. 1 tunnel; that if any such fault as that described with a 100 foot displacement existed he would have seen it and that there was no such fault in either working. He also says that no fault with such displacement could die out so rapidly as to displace the Black Tail vein or the so-called No. 4 vein 100 feet and not displace the so-called Discovery vein (R. p. 507). Mr. Searls testified that the small quartz exposure

at 64-C represented a little branch of the Black Tail vein similar to other branches (R. p. 511).

Before closing this discussion, we again direct attention to the surface and to the fact that the witnesses for the plaintiff made a critical examination of the ground foot by foot and reported to the court that the vein and the quartz of the vein could be continuously traced according to their observations from the trench G-1 northerly by Station 552 and around the bend in the vein.

This testimony is testimony of observed facts and should have greater weight than the opinions and theories of even the best of mining engineers, who for their premise must infer the basic data. This is precisely the difference between the case of the plaintiff and the case of the defendant.

With respect to the observations of the witnesses on behalf of the defendant in their examination of the surface, it may be fairly said that they did not agree, and that at least one of them was not entirely clear with respect to what is shown in the important trench north of Station 558. Mr. Lakes, for appellee, testified that there was a break in the quartz in that trench, and on page 389 he testified as follows:

"Q. How many feet is there in there that he cannot follow quartz?

A. Between 8 and 10 feet.

Q. Between 8 and 10 feet within that tunnel 558, you say you cannot follow quartz?

A. Cannot follow quartz with the strike of either one

of the approximate—approximate with either one of these veins.

Q. Let's leave that out. Isn't it true that he can follow quartz? Now, we will leave out the strike and dip and so forth—follow continuous quartz in that trench from its face to its mouth.

A. I couldn't.

Q. You couldn't?

A. No, sir.

Q. And there is a difference of ten feet in which you say there is no quartz?

A. Approximately 10 feet.

Q. Approximately 10 feet there?

A. Yes."

Mr. Burch, for appellee, testified (R. p. 324) as follows:

"Q. As a matter of fact, you were unable to trace continuous quartz through that trench down to its southerly end?

A. Yes, sir, I could not; not unbroken."

Mr. Wiley did admit that there was an interval where there was much less quartz than at the north end of the trench, but he did admit that there was continuous quartz down the trench (R. p. 494).

In view of this somewhat contradictory testimony on the part of the defendant's witnesses and the apparent uncertainty with which at least two of them described it, it would certainly seem that the weight of the evidence upon this issue is with the plaintiff.

The entire theory of appellee's witnesses may be thus summarized:

Assuming a great fault with a displacement on the level of 100 feet, and an unknown vertical and longitudinal displacement, the vein at the southwest corner of the claim originally was a part of the so-called Lone Pine No. 2, and the branch at 64-C could be the faulted segment of the Black Tail; or

Assuming the vein at the southwest corner of the claim to be a faulted segment of the so-called Lone Pine No. 2 vein and the small quartz stringer at 64-C to be the faulted segment of the Black Tail, then there was such a fault.

In either case, the basic data must be assumed or inferred.

A little postmineral movement along the vein is magnified to a great fault, with a displacement of 100 feet, but it does not displace the so-called discovery vein.

III.

THE RELATION OF THE EXTRALATERAL RIGHT OF THE LONE PINE CLAIM TO THE STRIKE AND DIP OF THE BLACK TAIL VEIN.

Mr. Searls covered this question in his testimony and with plaintiff's Exhibit 3. He describes it in the following language:

"There is shown on this map plaintiff's Exhibit 3, the number 2 or 200 ft. level of the Pine mine and there is also shown a black line marked average course of the Black Tail vein in the Lone Pine claim, which is a line joining the exposures of the vein on this level where

it crosses the east side line and where it crosses the south end line of the Lone Pine mine. There is also shown through one extremity of that line a line parallel to the end line of the Lone Pine claim and marked here 'Direction of extralateral right.' The line marked 'Average course of the Black Tail vein in Lone Pine claim' represents the average course because the vein being curved has many local strikes. Observations for strike taken at various points on the curve of the vein would give different results and the only result that can be had for its average course is a line showing the extremities of the exposure on the same horizontal plane within the claim.

That being then the average course or strike of the vein within the Lone Pine claim, a line drawn at right angles to it is the dip or direction of dip. The angle between the dip and the end line or direction of extralateral rights of the Lone Pine claim is 23 degrees.

There is also shown on this map, Plaintiff's Exhibit 3, the 500 level of the Last Chance and the 600 level; the 500 level being the longest level driven within the Last Chance claim. There is shown immediately above that level a line marked 'Average Course of Black Tail Vein in the Last Chance Claim,' which is a line parallel with the exposure of that vein continuously from one end of that drift to the other. That drift represents as nearly as we may know the average strike of the vein within the Last Chance claim and the line at right angles to it represents the dip. The direction of the end line or the direction of extralateral right makes an angle with that direction of 37 degrees.

Q. So that whether you take the course of the vein in the Lone Pine claim or the course of the vein in the Last Chance claim between the planes of the end line and one parallel thereto on the Pine claim, you are following more upon its downward than upon its onward course.

A. That is true; the direction of the extralateral

right is more nearly on the dip of the vein than on its strike." (R. pp. 75-76).

This testimony stands undisputed. In the first place, no one denied that the course of the vein within the claim is determined in the manner stated by Mr. Searls. It is not a local course, but the general course which is taken.

Whether the course is taken of the vein within the Last Chance claim or the vein within the Lone Pine claim, the result is the same and the extralateral rights sought are more in the direction of the dip than in the direction of the strike and the question, therefore, should be decided as a question of fact, namely, that the extralateral rights sought to be exercised are more upon the dip than upon the strike.

In this case the question involved is as to the apex within the Lone Pine claim and it is the course of the vein in that claim that affects the extralateral rights.

Counsel for appellee in the court below suggested that it was the local course at the precise point where it passed out of the east side line which controlled. But that manifestly could not be true. It is the course of the entire vein within the claim.

It has been held in this circuit that it is immaterial if the extralateral right be more upon the strike than upon the dip.

Last Chance, etc., M. Co. v. Bunker Hill & S. M. & C. Co., 131 Fed. 579

Empire State-Idaho M. & D. Co. v. Bunker Hill & S. M. & C. Co., 131 Fed. 591.

Lindley on Mines, Sec. 319.

The action was instituted to quiet title to the Lone Pine claim and as to what was properly included within that claim. If the situs of the apex is as claimed by the plaintiff, the outside parts of the vein between a vertical plane drawn downward through the south end line of the Lone Pine claim and a vertical plane parallel thereto 589 feet northerly (that is, at the point of departure through the west end line) are just as much a part of the Lone Pine claim as if they were entirely within its surface lines.

Tyler M. Co. v. Last Chance M. Co., 90 Fed 15-21

Empire State-Idaho M. & D. Co. v. Bunker Hill & S. M. & C. Co., 121 Fed. 973.

BURDEN OF PROOF.

The continuity and identity of the vein is admitted from the Last Chance working to the southerly end of the open stope and into the trench north of Station 558, and the Black Tail vein is conceded to have extended as far northerly as the southern end of said trench at Station 558. - Mr. Wiley admitted continuous quartz through the length of that trench.

Underground, the Black Tail vein was admitted as far north as the Sand winze. The witnesses on the other side testified that the so-called Lone Pine No. 2 vein extended to the face of the drift southerly from Station 331, not over 10 or 15 feet away from the Sand winze. All of the witnesses for the appellant testified, and Mr. Wiley, for the appellee, was forced to admit that the projection of that vein upward from

the Sand winze would show a connection with the vein in the working South of 331.

All that is necessary in meeting that burden of proof was to show the continuity of the vein around the bend and that has been done by a great preponderance of the evidence.

Respectfully submitted,

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JOHN H. WOURMS,

Attorneys for Appellant.